

Internal Revenue Service  
**memorandum**

CC:TL-N-9839-89

Br4:WHBaumer

date: OCT 20 1989

to: District Counsel, Jacksonville CC:JAX  
Attn: Stephen R. Takeuchi

from: Assistant Chief Counsel (Tax Litigation) CC:TL

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subject: Request for Tax Litigation Advice Concerning  
Interpretation of Rev. Rul. 80-62

This is in reply to your request for technical advice concerning a difference of opinion between your office and the Jacksonville Appeals Office with respect to an interpretation of Rev. Rul. 80-62, 1980-1 C.B. 63. It is the position of the Jacksonville Appeals Office that the substantiation requirements of I.R.C. § 274(d) are satisfied whenever an employer pays a per diem for travel away from home which is equal to or less than the federal per diem for the same area. Your office believes that an employer must base its per diem travel allowance practices on reasonably accurate estimates of travel costs and that reliance on established federal rates is insufficient for this purpose.

ISSUE

Whether an employee who receives a per diem allowance for travel away from home which is equal to or less than the federal per diem allowance for the same area is considered to have substantiated the amount of the expense for purposes of I.R.C. § 274(d).

CONCLUSION

We agree with the Jacksonville Appeals Office that an employee who receives a per diem allowance for travel away from home which is equal to or less than the federal per diem allowance for the same area is generally considered to have automatically substantiated the amount of his expenditures for purposes of I.R.C. § 274(d). However, the taxpayer must substantiate the elements of time, place, and business purpose.

FACTS

During the development of a Tax Court case involving [REDACTED], your office wrote a memorandum dated May 24, 1989 to the Jacksonville District Office suggesting an

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information gathering project on Florida [REDACTED] employees. Pursuant to that project, another employee of the State Insurance Department, [REDACTED], was examined. The examiner concluded that even though [REDACTED] had received a per diem allowance equal to or less than the government rate in the area involved, he still had to furnish motel receipts in order to meet the substantiation requirements of I.R.C. § 274(d).

[REDACTED] protested the determination to the Appeals Office in Jacksonville based on Rev. Rul. 80-62. In a letter dated October 12, 1988, your office sent an advisory opinion to the Jacksonville District Director agreeing with the determination. You based your decision partly on the fact that the State of Florida does not appear to require verification of the amount of expenses incurred. You argued that such verification was necessary if the employer was to meet the ordinary and necessary business expense test described in I.R.C. § 162. You also stated that it appears that [REDACTED]'s travel expenses should be disallowed under both the itinerant employee and indefinite assignment theories. Notwithstanding your advisory opinion, the Appeals Division settled the case.

In [REDACTED], [REDACTED]'s work itinerary required him to be in Miami, Florida from [REDACTED] through [REDACTED]. From [REDACTED] through [REDACTED] he was on business in Wisconsin. In [REDACTED] and [REDACTED] he was on business in Orlando, Florida and North Carolina. During the periods in question, the taxpayer's personal residence was located in [REDACTED], Florida until mid-[REDACTED] when the taxpayer and his wife moved to [REDACTED], Florida.

The Appeals Office in Jacksonville noted that although the District Director had not made any determination as to whether the employer's travel allowance practices were based on reasonably accurate estimates of travel costs, it appeared that the cost estimates would be considered reasonably accurate since they were equal to the lowest federal rate for the continental United States. In addition, the Appeals Office concluded that [REDACTED]'s employment was neither indefinite nor of an itinerant character.

#### DISCUSSION

I.R.C. § 162(a) provides, in part, that a deduction shall be allowed for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including travel expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business.

I.R.C. § 274(d) provides, in part, that no deduction shall be allowed under section 162 for any expenditure with respect to traveling away from home unless the taxpayer substantiates (1) by adequate records, or (2) by sufficient evidence corroborating his own statement, the amount, time, place, and business purpose of such expenditure.

Under the authority granted to the Commissioner by I.R.C. § 274(o) and Treas. Reg. § 1.274-5(f), presently Treas. Reg. § 1.274-5T(g) for taxable years beginning after 1985, travel allowances that are in accordance with reasonable business practices may be regarded as satisfying the substantiation requirements. Rev. Rul. 80-62 was published under this authority.

Rev. Rul 80-62 holds that if, in the case of expenses for travel away from home, an employer reimburses employees for subsistence or provides the employees with a per diem allowance in lieu of subsistence in an amount that does not exceed the greater of (1) \$44 per day or (2) the maximum per diem rate authorized to be paid by the federal government in the locality in which the travel is performed, such reimbursements and allowances shall be deemed substantiated within the meaning of Treas. Reg § 1.274-5(c) if (1) the employer reasonably limits payment of such travel expenses to those that are ordinary and necessary in the conduct of the trade or business and (2) the elements of time, place, and business purposes of travel are substantiated in accordance with Treas. Reg §§ 1.274-5(b)(2) and (c).

Under Rev. Rul. 80-62, the district director will determine whether an employer reasonably limits the payment of expenses for travel away from home to such expenses as are ordinary and necessary in the conduct of a trade or a business by, in the case of per diem allowances in lieu of subsistence, determining whether the employer's travel allowance practices are based on reasonably accurate estimates of travel costs, including recognition of cost variances encountered in different localities.

If an employee, under a travel expense arrangement described above, receives an amount from an employer equal to the deductible business expenses, the employee need not report such reimbursement in gross income.

If an employer does not require an adequate accounting of his employee, the travel expenses may still be allowed if the employee submits Form 2106 as part of his tax return and substantiates the expenses as requested by that form. The Form 2106 requires the same information as is required of an employee who is claiming a deduction for expenditures in excess of reimbursements (namely a breakdown of the expenses into

categories such as transportation and meals and lodging while away from home overnight). In addition, the employee must keep the kind of detailed records and supporting evidence that will substantiate each element of an expenditure.

For tax years beginning after 1988, I.R.C. § 62(c), enacted as section 702 of the Family Support Act of 1988, provides that reimbursed expenses under a "nonaccountable" reimbursement plan, may not be excluded from gross income. The significance of this provision is that reimbursed travel expenses under a "nonaccountable" plan are subject to the two-percent floor of I.R.C. § 67.

Publication 463 (Rev. Nov. 88) entitled Travel, Entertainment and Gift Expenses at page 12 and Publication 17 (Rev. Nov. 88) entitled your Federal Income Tax at page 108 provide as follows:

Per diem allowance or reimbursement. If, instead of getting reimbursed for living expenses, you get a fixed allowance or reimbursement that is less than \$44 a day, or the maximum daily rate authorized to be paid by the federal government in the locality in which the travel is performed, you satisfy the adequate accounting requirements if:

- 1) Your employer reasonably limits payments of the travel expenses to those that are ordinary and necessary in the conduct of the trade or business, and
- 2) The time, place, and business purpose of the travel are proved, as explained later under Records.

If the Internal Revenue Service finds that an employer's travel allowance practices are not based on reasonably accurate estimates of travel costs, including recognition of cost differences encountered in different localities, the employees will not have accounted to their employer and will be required to prove their expense.<sup>1/</sup>

It is the position of the Appeals Division that if the employer pays per diem for travel away from home which is equal to or less than the Federal per diem for the same area, the special exception provisions of Rev. Rul. 80-62 will apply and the employee need not include in his income the reimbursed

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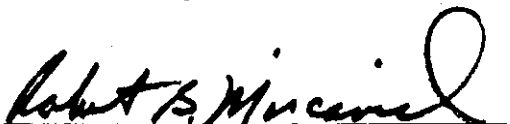
<sup>1/</sup> These rules were derived from Rev. Rul. 80-62, 1980-1 C.B. 63, Rev. Rul. 84-51, 1984-1 C.B. 90, Rev. Rul. 84-164, 1984-2 C.B. 63 and Temporary Treas. Reg. 1.274-5T(g). There is no intention at the present time to change these rules.

amounts nor establish entitlement to expenses as required under I.R.C. § 274. It is your position that for this exceptional treatment to apply, the taxpayer's employer must reasonably limit payment of such travel expenses to those that are ordinary and necessary in the conduct of the trade or business (consequently require reporting by the employee similar to that required by the Federal Government) and base its travel allowance practices on reasonably accurate estimates of travel costs.

The conclusion of the Appeals Division is consistent with Service position, *i.e.*, the employee's allowance must be ordinary and necessary and the time, place and business purpose of the travel must be proved but he need not substantiate the amount paid for lodging. It would appear that the taxpayer involved in the instant case could easily satisfy these tests. Consideration has been given to taking the position in the regulations that a taxpayer on per diem must provide his employer with a lodging receipt but this position was never adopted.

If you have any questions with respect to whether a particular taxpayer is "away from home" (see Rev. Rul. 73-529, 1973-2 C.B. 37), please contact Cliff Harbourt at 566-3470. If you have any questions with respect to this memorandum, please contact William Baumer or Bob Miscavich at 566-3325.

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